

ceptions, a bankrupt pursuer will only be allowed to litigate upon the condition of finding security. It seems to me that this distinction is one the principle of which is equally applicable to litigations between the bankrupt and the body of his creditors as represented by the trustee. Now, when the bankrupt is defender he is not as a general rule called upon to give security, but it is a matter of discretionary administration whether the Court will compel him to do so; and I think no better reason can be found for exercising that discretion, in the sense of calling upon the defender to find security, than the circumstance or reason that although by the form of the action he is defender he is in substance pursuer, because he is in the position of making a claim against the trustee. Your Lordship has pointed out that such is the position of parties in the first case, and just because the question of finding caution is matter of discretion in the case of a defender I am of opinion that wherever it can be shown that the defender is virtually a pursuer, that discretion ought to be regulated according to the rule applied to a person who is in form a pursuer. If that circumstance had been taken into view by the Lord Ordinary I should, agreeing with Lord Adam, be disinclined to interfere with the Lord Ordinary. But I think that element appears to have been overlooked, and we must reconsider the matter on its merits, and find that the defender ought to be ordained to find caution for expenses as a condition of defending the action.

The Court recalled the interlocutor of the Lord Ordinary, and on the motion of the complainer ordained the respondent to find caution for expenses, and remitted to the Lord Ordinary to proceed with the cause.

Counsel for the Complainer—Graham Murray—C. S. Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Respondent—Asher—Ure. Agents—Dove & Lockhart, S.S.C.

Saturday, December 21.

SECOND DIVISION.

DAKERS v. THARSIS SULPHUR AND COPPER COMPANY (LIMITED), AND CHARLES TENNANT & COMPANY (LIMITED).

Reparation—Joint Liability for Damages—Independent Contract—Infringement of Bye-Law—Responsibility for Moveables after Delivery—Bill of Exceptions—New Trial.

The Tharsis Sulphur and Copper Company (Limited), by Cunningham, acting under a wheeling and weighing contract, discharged a cargo of pyrites upon a quay between 10th and 15th November, delivery of which to Charles Tennant & Company under contract

with them took place on the latter date. A passage of only 4 feet, contrary to one of the harbour bye-laws, was left between the pyrites and the edge of the quay, and upon 19th November a sailor returning to his ship tripped upon some pieces which had fallen over the roadway, and fell and afterwards died from his injuries.

An action of reparation was brought by his widow and children against both companies jointly and severally.

At the trial counsel for the first company asked the presiding Judge to direct the jury (1) that the discharge having been made by an independent contractor they were not responsible for the dangerous position of the cargo, and (2) that they were not liable for contravention of the bye-law; and counsel for the second company asked the Judge to direct that if they had used all reasonable despatch in removing the cargo they were not liable. The presiding Judge refused to give the rulings asked, and the jury found both sets of defenders liable jointly.

Both defenders excepted to the Judge's ruling, and also moved for a new trial on the ground that the verdict was contrary to the evidence. The facts were not disputed, but the Tharsis Company argued that they could not be liable after delivery of the cargo for an accident due to its dangerous position, and the Charles Tennant Company argued that they were not liable for the dangerous position in which the cargo had been put.

The Court granted a rule to show cause, but after argument discharged the rule, and refused the bills of exceptions.

The s.s. "Iberia" arrived in Glasgow on 10th November 1888 and was berthed in the Kingston Dock. She contained a cargo of 1168 tons of pyrites from the mines in Spain belonging to the Tharsis Sulphur and Copper Company (Limited), Glasgow, discharge of which was begun at 6 p.m. on 12th November, and continued day and night until completed at 2 p.m. on 15th November. The cargo was piled up in the shed and upon the roadway, which was 10 feet wide between the shed and the cope of the quay, but a passage about 4 feet wide was left along the edge. The cargo was weighed and deposited under the supervision of James Cunningham, acting under a wheeling and weighing contract with the Tharsis Company. The said cargo was for delivery to Charles Tennant & Company of St Rollox (Limited), chemical manufacturers, Glasgow, in terms of a contract between them and the Tharsis Company, which provided, *inter alia*, that the last day of ship's discharge or weighing from ship or depot was to be considered the date of delivery. Upon the evening of 15th November Cunningham sent notice that the discharge was completed to Charles Tennant & Company, who thereupon instructed their carters to remove the cargo, but as it was impossible to do so within the 48

hours allowed by the Harbour Byelaws an extension of time of 168 hours was obtained from the Clyde Trustees.

Between 5 and 6 o'clock on the evening of 19th November, Alexander Dakers, master-mariner, 61 Gladstone Road, Birkenhead, England, and then acting as mate on board the s.s. "Pheasant," while on his way to his ship slipped upon some loose lumps of pyrites lying on the roadway, and fell over the quay edge on to the deck of a ship lying below, and met with such severe injuries that he died in the infirmary upon 2nd February 1889.

His widow Mrs Catherine Mearns or Dakers, and his children William, Catherine, and Louisa Betsy, brought an action in the Sheriff Court at Glasgow against the Tharsis Company and Charles Tennant & Company to have these defenders ordained jointly and severally to pay £1500 to the widow and £500 to each of the children for the loss of their husband and father.

The pursuers pleaded—“(1) The death of said Alexander Dakers having been caused by the gross and culpable fault and negligence of the defenders, or one or other of them, or others for whom they are responsible, the pursuers are entitled to reparation from said defenders.”

The defenders, the Tharsis Company, pleaded—“(1) The present defenders having delivered the ore, in terms of the contract with the other defenders on 15th November 1888, they cannot be liable for anything that occurred subsequent to that date, and should be assoilzied with costs. (2) The death of the said Alexander Dakers not having been caused by the present defenders, or anyone for whom they are responsible, they should be assoilzied.”

The defenders Charles Tennant & Company pleaded—“(3) The defenders Charles Tennant & Company of St Rollox, Limited, not being responsible for the manner in which the cargo was discharged or stowed, and having no control over said operations, are not liable for any accident that may have happened in consequence of such discharge or stowage or otherwise. (4) The defenders Charles Tennant & Company of St Rollox, Limited, should be assoilzied, in respect—(1st) Said accident was not caused by their fault, or the fault of those for whom they are responsible; (2nd) that it was caused by the fault or negligence or want of ordinary care of the deceased himself; or at least (3d) that the deceased's fault, negligence, or want of care materially contributed thereto.”

The case was removed to the Court of Session, and was tried before Lord Young and a jury on 25th and 26th July 1889.

There were two issues raising the question of fault in ordinary form, one directed against the Tharsis Company and the other against Charles Tennant & Company, with one schedule of damages, but it was agreed upon both sides that should the jury hold that both defenders were in fault the result would be that they would be conjunctly liable for the damages awarded.

The evidence brought out the facts given above.

Section 16 of the Byelaws and Regulations for the river Clyde and harbour of Glasgow, enacted by the Trustees of the Clyde Navigation upon 3rd January 1860, and approved and confirmed by the Sheriffs of Lanark, Dumbarton, and Renfrew, was relied upon by the pursuers. It provides that “No goods which have been discharged from, or are intended to be put on board any vessel at the quays, shall be laid down between the sheds and the breast of the quays, or between the breast and the palls, unless said goods are immediately to be taken on board or to be removed from the quays, and if they are not immediately shipped or removed from the quays they shall be placed at the distance of at least twenty-two feet from the breast of the quays, so that the passage along the wharfs and the loading and unloading of vessels may not be interrupted; and all inward cargo shall be wholly removed from the wharfs within forty-eight hours of being placed thereon, and no goods of any kind shall be left on the quays during the night without a private watchman.”

Charles Tennant & Company relied upon the byelaw dated 1st November 1870, which enacted and ordained that the Clyde Trustees might, in any case where the same could be allowed without prejudice to the working of any quay, permit goods to remain on such quay for a period to be fixed by them, being forty-eight hours, on the terms and conditions specified in said byelaw.

After Lord Young had delivered his charge to the jury, counsel for the Tharsis Company asked his Lordship to give the following directions to the jury—“(1) If the jury are satisfied on the evidence that James Cunningham employed and paid the men who stacked the heap of pyrites in question, and that the defenders, the Tharsis Sulphur & Copper Company, did not interfere in that operation, then the said defenders are not responsible for the fault, if any, in the stacking of the heaps. (2) That even if the jury are satisfied that the ore in question was so placed on the quay at Kingston dock as to be in contravention of the 16th of the byelaws and regulations enacted by the Trustees of the Clyde Navigation, the defenders, the Tharsis Sulphur & Copper Company, are not liable to the pursuers in respect of the said contravention.” Lord Young refused to give the directions asked, whereupon the counsel for the defenders excepted to the ruling and refusal of his Lordship.

At the same time counsel for Charles Tennant & Company asked his Lordship to give the following direction to the jury—“That if the jury were satisfied on the evidence that the defenders Charles Tennant & Company of St Rollox, Limited, removed the ore in question from the place where it was deposited by the Tharsis Sulphur & Copper Company, Limited, with due and reasonable despatch, they must find that the said Charles Tennant & Company are not liable in damages to the pursuers”—which direction Lord Young refused to give, whereupon the counsel for the said defen-

ders, Charles Tennant & Company of St Rollox, Limited, excepted to the said ruling and refusal of his Lordship.

The jury found unanimously in favour of the pursuers on both issues, and assessed the damages as follow—Mrs Dakers £400, her son William £100, and each of her daughters £150.

The defenders also moved for a new trial, on the ground that the verdict was contrary to the evidence, and obtained a rule to show cause. The debates upon the bills of exception and upon the question of a new trial were taken together.

Argued for the Tharsis Company.—The 16th section of the byelaws was inapplicable to this quay, which was not 22 feet wide altogether. The byelaws were not made in the interests of the public, but for the regulation of the harbour by the Clyde Trustees, whose officials systematically dispensed with the observance of this byelaw at this dock. Even if the byelaw were applicable, and had been infringed, the infringer, although he might become liable for a penalty, incurred no additional civil liability—*Wilson v. Merry & Cunningham*, May 29, 1868, 6 Macph. (H. of L.) 81, Lord Chelmsford's opinion, p. 92. There must be fault. Here if there was fault it was not fault for which the Tharsis Company were liable. If the fault was in laying the pyrites down as was done, that was the fault of the independent contractor Cunningham. The operation not being in itself a necessarily dangerous one as in *Bower v. Peate*, February 25, 1876, 1 Q.B.D. 321; *Dalton v. Angus*, H. of L., June 14, 1881, 6 Ap. Cas. 740. The mere proprietorship of moveables did not make the owner liable for accidents caused by them in the same way that the proprietorship of heritage did—*Campbell v. Kennedy*, November 25, 1864, 3 Macph. 121; *Pickard v. Smith*, May 29, 1861, 10 C.B. (new series) 470; *Overton v. Freeman*, January 13, 1852, 11 C.B. 867, and 21 L.J., C.P. 52; *Murray v. Currie*, November 16, 1870, L.R., 6 C.P. 24; *M'Lean v. Russell, M'Nee & Company*, March 9, 1850, 12 D. 887; *Milligan v. Wedge*, 1841, 4 Perry & Davidson 714. Even if the pyrites were in a dangerous position all possible responsibility for it on the part of the Tharsis Company ceased on 15th November, when the property in it was handed over to Tennant & Company, who may have been in fault in leaving it there unwatched. The accident did not occur till the 19th, by which time the cargo should have been removed, and for its non-removal the Tharsis Company could not be made liable. If they could, when was their liability to cease?

Argued for Charles Tennant & Company.—On the grounds stated by the other defenders liability did not attach from the byelaw nor from the mere proprietorship of the moveables. Where, then, was their fault? In not removing timeously?—They worked as hard as possible with carts at both ends of the shed. In not watching?—They were under no obligation to watch unless under the byelaw. In leaving the cargo in a dangerous position?—They did not know it was in a dangerous position.

They were entitled to rely upon the harbour authorities either seeing it was safe or informing them it was not. Neither the Tharsis Company's knowledge nor Cunningham's knowledge was their knowledge.

Argued for the pursuers.—The Judge had rightly refused to give the directions asked, and the jury had found in accordance with the evidence. The deceased's death was due to the fault of the Tharsis Company in putting the pyrites where they did, and of Tennant & Company in not either removing it at once or watching it, and therefore both defenders had been rightly found liable. The former could not escape liability because of their contract with Cunningham. The contract was one of weighing and wheeling only—incidental to landing. Cunningham had no power to choose the place, and the Tharsis Company had a man there who knew where the cargo was deposited, and should have told them of its dangerous condition. Besides, the accident happened after the contractor's work was over. In the cases cited by Mr Murray the accident happened in the course of the employment, as if one of the contractor's men here had knocked down the deceased with his wheelbarrow. The Tharsis Company were responsible to the public for accidents due to the position in which their cargo had been put by their contractor. The byelaws were in force, and if at this quay 22 feet could not be left free, at least more than 4 feet could have been left. Tennant & Company were liable as proprietors of this dangerous cargo, having taken it over, and having left it unwatched.

At advising—

LORD YOUNG.—The accident by which the deceased Alexander Dakers lost his life happened between five and six on the evening of 19th November 1888. The place was the quay of the Kingston Dock, which he was then walking along on his way to his ship, which was lying there, and the immediate occasion of the accident was that some loose lumps of pyrites were then lying on the roadway, so that he was tripped by them, and fell over the quay edge on to the deck of a ship lying below, and broke his neck. This action of damages at the instance of his widow and children is directed against the Tharsis Company and Tennant & Company conjunctly and severally, and these defenders defend themselves separately, and on separate grounds.

The pursuers' ground of action against the Tharsis Company is that they a few days before the accident improperly deposited and piled a heap of pyrites on the quay in an obviously dangerous manner, and that the lumps which tripped the deceased fell from this heap. Against Tennant & Company the ground of action is that they having purchased the pyrites from the Tharsis Company, and accepted delivery of it from them on 15th or 16th November (three or four days before the accident) as it then lay improperly and dangerously deposited and piled on the

quay, blamably allowed it to remain in that dangerous position unwatched and without any precaution for the safety of persons lawfully passing along the quay.

The case was, with the assent of the pursuers and both sets of defenders, sent to trial on the two issues, which they adjusted (with one schedule of damages) on the footing that the jury might hold that both defenders were in fault, with the result of conjunct liability for the damages awarded, or that only one was in fault, with of course the result that the damages awarded should be paid by that one alone. The jury have found (as it was certainly anticipated they might) that both defenders were in fault, and that they are conjunctly liable to the pursuers for the consequences.

The cargo of pyrites in question was brought by the Tharsis Company from their mines in Spain to enable them to fulfil their current contract to supply Tennant & Company with the pyrites they required for their works in Glasgow. The ship that brought the pyrites was berthed in the Kingston Dock, and there discharged. Written notice of the completion of the discharge was despatched to Tennant & Company on the evening of 15th November, and received by them on the following day. The contract of sale provides that "the last day of ship's discharge or weighing from depôt is to be considered the date of delivery." The pyrites were weighed at the ship's side as landed, and immediately wheeled to the quay shed, and there deposited till the shed was full, after which the overflow, which was large, was deposited and piled up, as I have already stated, on the roadway of the quay. The discharge was, as the Tharsis Company state (Ans. 2), "commenced on the 12th November at 6 p.m., and was continued without intermission until the completion on the 15th November at 2 o'clock p.m." The Tharsis Company were of course, and properly, desirous that the discharge should be effected as expeditiously as possible so that there should be no avoidable detention of the ship. But the haste was, the pursuers contended, excessive, when more was landed at a time (that is, without cessation to allow removal) than there was proper and safe accommodation for at that dock. The quay there is only ten feet wide, and such a quay, which is a public roadway open and used day and night, is not, it was maintained, a proper place to deposit and pile up pyrites in quantity to await removal. It was, in short, wrong, because dangerous, to use the roadway of the quay as an extension of the shed floor. That was truly the pursuers' charge of fault against the Tharsis Company. In support of it they relied on the manifest and proved, as they contended, danger of such use, and also upon the by-laws of the Clyde Trustees, approved and confirmed by the Sheriff, which proclaim the danger of such use and prohibit it. The cargo amounted to 1168 tons, and a large part of it—several hundreds of tons—was deposited on the quay for no other reason than that the shed, the proper place of deposit, was not large enough to hold it,

and that it was thought desirable in the interests of the Tharsis Company to have it out of the ship at once by a discharge, "continued without intermission," to afford time for removal. According to the evidence the time usually taken to remove such a cargo is from ten to twelve days after the landing.

At the trial I left it to the jury whether or not the Tharsis Company were in default for depositing the pyrites on the roadway of the quay, and declined to give the direction which their counsel desired, viz., that they were not responsible if the work was done, as no doubt it was, by James Cunningham or his men under the weighing and wheeling contract produced. I was and remain of opinion that it was for them and not for their weighing and wheeling contractor to judge with what haste and despatch the ship should be discharged, and that if there was fault in landing more cargo at a time than the shed would hold, and (leaving no interval for removal) depositing the surplus on the quay, they must bear the responsibility, although they had in fact exercised no judgment in the matter, but left it to the wheeling contractor and his men.

The jury were of opinion that the Tharsis Company were in fault, and I shall say no more on this head than that I think there was reasonable evidence to support that opinion. Whether or not the accident to the deceased was attributable to the fault of the Tharsis Company so as to make them liable for it was another question which required and received distinct consideration. It is indeed, as I thought at the trial, and still think, the only question on the case attended with any difficulty. I shall express my views on it after I have noticed the pursuer's case against Tennant & Company.

That case is that Tennant & Company having on 15th November taken delivery of the pyrites as it then lay in the shed and on the roadway of the quay, and the portion on the quay being an improper and dangerous obstruction, they improperly left it there unwatched, and without taking any precaution against danger till the accident to the deceased occurred.

On the assumption that the pyrites on the quay had been improperly placed there, and that its continuance there was attended with serious danger to the public using the quay, I am doubtful whether Tennant & Company were bound to accept delivery of it in that position, and also whether they would have done so had they known the facts. They appear, from the evidence of their manager (Thomas Alexander), to have assumed that the whole cargo was rightly placed and no obstruction, because had it been otherwise they would "expect intimation from the Clyde Trustees." They accordingly merely instructed their carters "to remove it" without any such orders for despatch and watching as they presumably would have given had they known of the dangerous position of their goods, and the consequent urgent call for their immediate removal and careful watching

during the process. And I cannot avoid saying that I think there is room for serious reflection on the conduct of the harbour authorities, who appear to have given no attention whatever to the dangerous condition of the quay, which the jury, proceeding on what I must regard as reasonable evidence, thought was obvious and in manifest and gross violation of the harbour bye-laws, and which after it had existed for several days and nights certainly in the result caused the death of Alexander Dakers. But the jury had to consider the conduct of Tennant & Company, who with full opportunity and means of knowing the position of the goods admittedly accepted delivery of them and so took them over as their property lying as a dangerous obstruction on a public thoroughfare and with all the consequent duties of watching and removing—however negligent the harbour authorities might be in failing to point out the danger and consequent urgency which undoubtedly existed.

It was not, so far as I remember, suggested by counsel at the trial or in the argument to this Court that there was no case against Tennant & Company for the consideration of the jury upon which they might if so minded legally affirm the fault imputed to them. I left the question to the jury, and they having affirmed the fault imputed, it is unnecessary for me to say more now than that I think their opinion is not against the weight of evidence but is in accordance with a quite reasonable view of it. The consequence of the fault so affirmed as rendering Tennant & Company liable for the death of the deceased, solely or conjunctly with the Tharsis Company was distinctly considered and dealt with at the trial as it must be by us now. But it will I think be convenient that I should first attend to the direction which Tennant & Company required me to give to the jury, and my refusal of which is the occasion of their bill of exceptions. The direction asked was that "if the jury were satisfied on the evidence that the defenders (Charles Tennant & Company) removed the ore in question with due and reasonable despatch they must find that they are not liable."

I thought at the trial, and think now, that I could not give that direction. In the first place, it would have implied a direction in law that there was no duty upon Tennant & Company to have the ore watched while it remained unremoved; in the second place, the expression "due and reasonable despatch" was ambiguous and misleading, if understood to mean such despatch only as was reasonable under the carter's contract without regard to the urgency of the particular case, and inapplicable to the evidence if taken to mean such despatch as the urgency of the case, having regard to the dangerous position of the ore on the roadway of the quay, demanded—there being no evidence whatever that any despatch of that character was used—but, on the contrary, evidence that Tennant & Company had no knowledge that the ore was in a dangerous position or an obstruction, and had not attended to

the removal of it in that view. Down to the occurrence of the accident, whatever removal had been made (and there was no evidence of the amount) was not such as to make any sensible impression on the state or quantity of the ore piled on the roadway of the quay at the place where the accident happened.

It follows from what I have said that the exception for Tennant & Company, as well as that for the Tharsis Company, ought, in my opinion, to be disallowed, and also that in my opinion the verdict cannot be disturbed as against the weight of the evidence, in so far as it affirms fault on the part of both defenders. The fault affirmed with respect to each I have, I hope sufficiently, explained. The Tharsis Company were, in the opinion of the jury, to blame for placing the pyrites as they did on the quay and so leaving it on 15th November, and Tennant & Company for leaving it so and failing to have it watched down to and at the time of the accident.

The accident happened on the evening of Monday 19th November, when the pyrites lay at the place where it happened exactly as the Tharsis Company had put and left it on the 15th, and as Tennant & Company had continued to leave it thereafter. The particular lumps which tripped the deceased had probably or certainly rolled down from the heap shortly before the accident, and after the day-work had stopped. But the possibility and likelihood of such rolling down on to the pathway left alongside the heap constituted the very danger which made it improper to place and leave the heap there. It seems therefore to be reasonably certain that the accident was occasioned by the dangerous condition of the pathway from the pyrites then upon it. At anyrate this was a question for the jury, and their verdict implies an affirmative answer. The Tharsis Company did not at the trial allege contributory negligence by the deceased. Tennant & Company did, and the jury, properly I think, negatived the contention.

It seems to follow clearly that responsibility for the accident must attach to both defenders or one or other of them.

Now, on this question, whether both are responsible, or only one, and if so, which, we start with the finding of the jury that both were in fault, each in the particular respect which I have pointed out. It was plain enough on the one hand that but for the act of the Tharsis Company, which constituted their fault, the accident would not have happened as it did; and, on the other hand, that it was reasonably possible, or even probable, that it would have been avoided had Tennant & Company done the things, the omission of which constituted their fault in the matter. It was urged on the jury for the Tharsis Company that the interval between the 15th and the 19th November, during which the pyrites were out of their charge and in that of Tennant & Company, was sufficient to disconnect the accident with the fault committed by them, but the jury, in the exercise of their judgment, rejected that view. It was not suggested at the trial or before us that on this

head any question of law was involved, or that any improper direction was given, or proper direction omitted. The jury were of opinion, and so found by their verdict, that the blameable conduct of both defenders conduced to the accident, and so caused the injury for which the pursuers seek reparation, and it is a sound and familiar enough proposition that if two parties are in fault—that is, to blame for a state of things whereby another is injured—it is not necessarily or even generally a good defence to either wrongdoer that the consequences of his fault would or might have been avoided had the other acted as he ought.

I think the whole matter was properly left to the jury, and that there are no grounds for disturbing their verdict.

I am therefore of opinion that the exceptions ought to be disallowed and the rules discharged.

The LORD JUSTICE-CLERK, LORD RUTHERFURD CLARK, and LORD LEE concurred.

The Court discharged the rule, and refused the bills of exceptions, and applied the verdict.

Counsel for the Pursuer—D. F. Balfour, Q. C.—Strachan—Baxter. Agent—William Black, S. S. C.

Counsel for the Tharsis Company—Graham Murray—Ure. Agents—Webster, Will, & Ritchie, S. S. C.

Counsel for Charles Tennant & Company—Jameson—Salvesen. Agent—F. J. Martin, W. S.

Thursday, January 9, 1890.

FIRST DIVISION.

[Sheriff of Roxburgh, Berwick, and Selkirk.

DAVIDSON v. THOMSON.

Servitude—Feu-Contract—Counterpart Rights—Acquiescence—Compensation for Loss of Right of Servitude—Interdict.

In the feu-contracts of the proprietors of a block of three dwelling-houses adjoining in a burgh, entered into in 1865, it was provided that B, the proprietor of the centre house, should have liberty of access to his back premises by a passage along the back of the houses belonging to A and C, the proprietors of the two outside houses, and that in consideration of this privilege granted to B that A and C should have the right to sink a well behind B's house and in his ground, and right of access to draw water. Instead of sinking the well the parties made use of a public well in the neighbourhood, and in 1878 a public water supply was introduced into the burgh. In 1879 B and C, acting on a joint plan, added to the back of their houses, B's building covering the greater part of the space provided for the well. A,

though aware of the erection of this building, made no objection to it. Eight years after A made an addition to the back of his own house covering the access used by B, who, however, continued to gain access to his back premises by going round A's new buildings.

In an action by A to interdict B from passing round the back of his new buildings, the Court were of opinion that the pursuer had abandoned his right to have a well sunk in the spot specified in the feu-contracts, but held that the defender's counterpart right of access had not been lost though the line of access had been varied in consequence of the pursuer's buildings erected in 1887, and interdict refused.

Opinion (per Lord Shand) that the pursuer had lost his right to sink a well on the defender's ground altogether.

Opinion (per Lord M'Laren) that if the pursuer had brought an action in 1879 to interdict the defender from building over the well space, he would only have obtained from the Court compensation for the right lost either in money or by having another spot provided for the purpose of sinking a well.

In the year 1865 Peter Davidson, Alexander Thomson, and William Dobson joined together in building a block of three dwelling-houses in Queen Street, Galashiels. It was arranged that Mr Davidson should have the house to the east, Mr Thomson the centre house, and Mr Dobson the west-most house. Each party entered into a separate feu-contract with Mr Scott of Gala, the superior. It was provided, *inter alia*, in Thomson's feu-contract that "the said Alexander Thomson and his forebears shall have the liberty and privilege of access to the back of the dwelling-house erected on the area hereby disposed, and to the garden ground and others behind the same, by the mutual entry left at the south-east end of the adjoining feu belonging to Peter Davidson, and by a passage at the back along the whole length of the said Peter Davidson's dwelling-house, extending the said passage to 4 feet in width exclusive of or in addition to the width of the outside stairs at the back of said Peter Davidson's house." The deed provided for a similar access for Thomson by a westward entry on the north-west end of Dobson's feu, and went on to provide and declare "that the said Peter Davidson and William Dobson, and their respective successors and tenants in the properties adjoining to the subjects hereby disposed, shall, in consideration of the foresaid privileges of access given to the said Alexander Thomson, have right respectively to a similar passage 4 feet in width along the back of the said Alexander Thomson's dwelling-house to the well after-mentioned, and shall also have right and liberty to sink or to join in sinking and obtaining water at all times from a well in a space in the area hereby disposed reserved for that purpose 6 feet square opposite the centre of his back wall of the dwelling-house belonging to the said Alexander